



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2003

Mr. Mark G. Mann
Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR2003-5550

Dear Mr. Mann:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 185635.

The City of Garland (the "City") received a request for a copy of the "winning bid for RFP-165-03." You ask whether the submitted information is excepted under sections 552.104 and 552.110 of the Government Code. In response to your notification, we have received comments from NexGen, Inc. ("NexGen") detailing reasons why a small portion of the submitted information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We reviewed the information you submitted and considered the issues you raise and NexGen's arguments.

Initially, we address the applicability of section 552.104 of the Government Code. Section 552.104 states information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). In this instance, the City takes no position as to the releasability of the submitted information. Therefore, because the City

claims no exception to required public disclosure, the City may not withhold the information under section 552.104 of the Government Code.¹

Next, we address NexGen's assertion of section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts §757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;

¹ Further, we note your brief indicates the City has completed the bidding process. Assuming the contract has been awarded, the City no longer has a section 552.104 interest.

- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts §757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on *specific factual evidence* that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b) (emphasis added). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also* *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

NexGen seeks to withhold three pages of its proposal, titled "Addendum: Financial Information Requirement for NexGen." To establish the applicability of section 552.110, NexGen merely makes conclusory and generalized allegations. Therefore, we find NexGen has not met its burden of making a *prima facie* case as required by section 552.110(a). *See* Gov't Code § 552.110(a). Further, NexGen has not made a sufficient *specific factual or evidentiary showing* that release of the information it seeks to withhold would result in *substantial competitive injury*. *See* Gov't Code § 552.110(b); *see also* *Nat'l Parks*, 498 F.2d. 765; Open Records Decision No. 661. Consequently, we conclude the City may not withhold the three pages at issue in NexGen's proposal under section 552.110 of the Government Code.

Also, we note the submitted information contains an e-mail address subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential.² See Gov't Code § 552.137. You do not inform us that the member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the City must withhold the e-mail address of the member of the public, which we have marked, under section 552.137 of the Government Code.

Last, we note the submitted information contains copyrighted materials. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

In summary, the City must withhold the e-mail address we have marked under section 552.137 of the Government Code. The City must release the remainder of the submitted information to the requestor; however, in doing so, the City must comply with applicable copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

² Section 552.137 does not apply to a general business e-mail address.

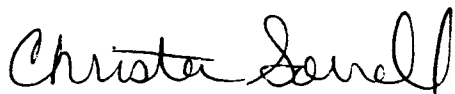
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/sdk

Ref: ID# 185635

Enc: Submitted documents

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